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17
18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **OAKLAND DIVISION**

21 EPIC GAMES, INC.

22 Plaintiff, Counter-defendant
v.

24 APPLE INC.,

25 Defendant, Counterclaimant

Case No. 4:20-cv-05640-YGR

**APPLE INC.'S ADMINISTRATIVE
MOTION REQUESTING GUIDANCE
REGARDING EVIDENTIARY HEARING**

The Honorable Yvonne Gonzalez Rogers
Hearing Date: May 8, 2024 (noticed date)
Hearing Time: 8:30 AM
Courtroom 1, 4th Floor

1 Defendant Apple Inc. (“Apple”) respectfully seeks this Court’s guidance regarding the Order
 2 Setting Evidentiary Hearing entered by the Court on April 23, 2024 (the “Order”). *See* Dkt. No. 925.

3 The Order “SETS an evidentiary hearing to further assess [Plaintiff Epic Games, Inc.’s (“Epic”)]
 4 arguments as well as Apple’s defenses” regarding Epic’s Motion to Enforce Injunction. Dkt. No. 925,
 5 at 3. On April 30, 2024, the parties exchanged witness lists (Dkt. Nos. 931, 932), pursuant to which they
 6 collectively may call up to seven witnesses:

Witness	Affiliation	Apple’s List	Epic’s List
Alex Roman	Apple	X	X
Matt Fischer	Apple	X	X
Carson Oliver	Apple	X	
Phil Schiller	Apple	X	
Ned Barnes	Expert	X	X
Alec Shobin	Epic		X
Benjamin Simon	Down Dog		X

15 After the witness lists were exchanged, the parties met and conferred regarding the hearing. The
 16 parties believe they can present these witnesses in the time allotted by the Court on May 8 and 10. As
 17 the Court is aware, Mr. Barnes is available only on May 10; the other witnesses are currently available
 18 either day.
 19

20 The issue on which Apple seeks guidance is whether Epic or Apple should go first in the
 21 presentation of testimonial evidence. Apple includes Epic’s position—as confirmed after conferring
 22 with Epic’s counsel—for efficiency of obtaining the Court’s guidance. Both parties are of course
 23 prepared to proceed in the fashion that would be most useful to the Court.

24 Apple’s view is: The four Apple witnesses (Messrs. Schiller, Fischer, Roman, and Oliver) should
 25 testify on May 8, when the Court has a full day available. Apple would present each of them by direct
 26 examination and Epic would have the opportunity for cross-examination. On May 10, when the Court
 27 has a half day available, the three non-Apple witnesses (Messrs. Barnes, Shobin, and Simon) should
 28 testify. Epic would present each of them by direct examination and Apple would have the opportunity

1 for cross-examination. This approach would allow for the most efficient and orderly presentation of the
2 testimonial and documentary evidence regarding the issues identified in the Court's Order, and is well
3 within the Court's discretion to regulate "the manner in which the proceeding shall be conducted."
4 *Cooke v. United States*, 267 U.S. 517, 537 (1925) (internal quotation omitted).

5 Epic's view is: As the moving party, Epic should be permitted to present its case first and call
6 any of the noticed witnesses in the order of its choosing.¹ In setting this hearing, the Court identified the
7 showing that Epic must make and stated that Epic must do so by clear and convincing evidence. (Order
8 at 2.) It is therefore appropriate for Epic to present the witnesses and evidence it believes it needs to
9 satisfy its burden. Apple will have the opportunity to cross examine every witness called by Epic, and
10 may present by direct examination any noticed witness who has not yet testified (with Epic having the
11 opportunity for cross examination). For the sake of efficiency, all testimony from a particular witness
12 should be presented through consecutive examinations by the parties until concluded, with no
13 requirement that cross examination be limited to the topics covered on direct examination.

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15 Dated: May 1, 2024

Respectfully submitted,

16 By: /s/ Mark A. Perry
17 Mark A. Perry
WEIL, GOTSHAL & MANGES LLP

18 Attorney for Apple Inc.

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28 ¹ Contrary to what the chart presented above suggests, Epic named "Any Witness Identified by Apple" in its own witness list, and may thus call Messrs. Oliver and Schiller in its own case if it so chooses. (See Dkt. 931 at 2.)